Maine Shore Access

ment of Economic and Community Development
Office of Comprehensive Planning

PUBLIC ACCESS SERIES

The coast is one of Maine's most precious recources. It has hosted Indians and explorers and supported generations of fishermen, clammers and wormers. It's scenic beauty and unhurried atmosphere has traditionally attracted hosts of vacationers fronm far and wide. Half of Maine's population lives in towns along tidal waters where recreation and fishing have providedjobs over the years and sizeable income to the State as a whole and to coastal communities in particular.

About ninety four precent of the coast is privately owned. Yet, growing numbers of boaters, residents, tourists, and recreationists has meant a growing demand for quality public access sites to the coast. This demandmay be increasingly difficult to satisfy, given the rate of residential and commercial development along the coastline.

Public access is people reaching the shoreline - physically, visually or psychologically. This may mean different things to different people; a boat launch ramp for a sailor, a pathway for a clammer, aparking lot and a pier for a commercial fisherman, or a coastal view for an artist. Because access nees differ, the means of providing public access opportunities will necessarily vary from one region to another and from town to town. Further, those responsible for planning and providing public access will also vary.

For example, providing regional parks to accomodate large numbers of people generally falls upon state or regional governments. However, access opportunities of a smaller scale may be best suited to identify local needs and opportunities such as small public easements, town roads, private ways or access arrangements with private landowners or devcelopers.

These handbooks focus upon public access activities at the community level. They provide background information, technical instructions and discussions of legal issues to assist towns in planning for, discovering and providing public access opportunities to meet their needs.

A GUIDE TO THE LIABILITY OF MAINE LANDOWNERS PROVIDING PUBLIC ACCESS

DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT
OFFICE OF COMPREHENSIVE PLANNING

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Josie Qunitrell of the Department of Economic and Community Development, Office of Comprehensive Planning was the contract administrator for the project. Mary Boyd-Broemel, also of the Office of Comprehensive Planning, illustrated the handbook and was responsible for final editing and production. Administrative support was provided by Lana Clough of the Office of Comprehensive Planning and Beverly Bayley-Smith of the Marine Law Institute.

Drafts of this report were reviewed by: David Keeley and Mark Dawson of the State Planning Office, Maine Coastal Program; Rebecca Warren Seel, Senior Staff Attorney with the Maine Municipal Association; and Madge Baker, Executive Director of the Southern Maine Regional Planning Commission.

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PREFACE

Public access is people reaching the shoreline - physically, visually, or even psychologically. Along Maine's 3500 miles of coastline, public access takes on a particular meaning for different types of people:

-- a wharf or pier for commercial fishermen;
-- a pathway to mud flats for clammers;
-- a sandy beach for swimmers and sunbathers;
-- a coastal view for sightseers; and
-- a boat ramp and parking area for recreation boaters

Traditionally, the Maine coast has been readily accessible to those who want to use it, even though a majority of coastal properties are privately owned (approximately six percent of the coast is in public ownership).

In recent years, however, there is evidence of changing attitudes about public access as rising property values have led to shifts in coastal land uses and land owners. Moreover, an influx of new residents and tourists to coastal communities, especially in southern and mid-coast sections of the state, has elevated the need for public access opportunities.

Deciding where and how to meet public access needs is a responsibility that must be shared by both public and private entities. State agencies, using a variety of funding sources and programs, are in a position to acquire land and develop facilities that meet statewide or regional needs. On the other hand, municipalities may be best suited to provide smaller scale facilities that meet local needs. Private organizations, such as land trusts, can also play an important role in securing property and funding improvements for public access.

To improve local public access opportunities, coastal communities have undertaken a variety of projects. For example, Islesboro, Stonington, and Vinalhaven have completed inventories of existing and potential public access sites. South Portland is implementing an ambitious Greenbelt Plan, and Yarmouth recently approved a $1.5 million bond to support the purchase of land for public access purposes. Other communities, including Machiasport and Stockton Springs, have worked with federal, state, and private groups to obtain funds for the acquisition of significant beach areas.

State support for local action is evidenced by both the Maine Coastal Policies, enacted by the Legislature in 1986, and the Comprehensive Land Use Regulation Act of 1988. Both laws contain strong policy statements promoting access to the shore for both commercial and recreational purposes. Comprehensive plans and implementation programs prepared by coastal cities and towns under the 1988 Act must be consistent with these state policies on public access.

To help coastal municipalities meet the public access requirements contained in these laws, the Maine Coastal Program has prepared a series of public access handbooks on a variety of topics. This handbook, A Guide to the Liability of Maine Landowners Providing Public Access, is intended to explain legal issues related to the liability of landowners who provide public access ways for recreational uses. Other handbooks describe the steps involved in preparing a public access plan, regulatory and non-regulatory techniques for securing public access sites, and discovering rights-of-way that may already exist within a community. Copies of these handbooks are available from the Office of Comprehensive Planning in the Department of Economic and Community Development, State House Station #130, Augusta, Maine 04333.

I. INTRODUCTION: THE PURPOSE AND SCOPE OF THIS GUIDE

A principal concern of landowners[1] who wish to allow members of the public access to or through their land is their potential exposure to liability in the event someone is injured while on their property. The purpose of this guide is to explain the law regarding the liability of landowners who provide access ways to the public for recreational opportunities. This guide does not, however, purport to be the sole source on which individual landowners or governmental entities should rely to gauge their liabilities. The unique factual circumstances of landowners will often determine whether or not, and how, the principles outlined here apply. Assistance of legal counsel is needed to assess a landowner's individual circumstances regarding liability. The focus of this guide is on Maine law; the law of other jurisdictions is referenced where appropriate to clarify issues ambiguous or unresolved under Maine law.

The guide is divided into four major sections. It first discusses the general rules of landowner liability. Although Maine statutes have changed these rules for landowners who provide public access in many instances, these general principles continue to apply in certain situations. The guide next discusses how the Maine Tort Claims Act (MTCA) limits the liability of the State of Maine and Maine municipalities in regard to public recreational facilities. The guide then discusses how other statutes limit the liability of private landowners who allow public access to and use of their property. The guide concludes with some practical suggestions of steps landowners may take to further limit their liability.

II. GENERAL LANDOWNER LIABILITY STANDARDS IN MAINE LAW

This section presents the basic legal principles under which a landowner may be held liable for injuries sustained by persons and property while on his land. In many instances, these rules do not apply to landowners who have allowed the public access to or through their land. For example, the Maine Tort Claims Act governs the rights and duties of state governmental entities in Maine. However, one must grasp these basic notions to understand how Maine law limits the liability of such landowners. Also, where statutes do not limit landowner liability, these rules determine a landowner's liability.

The law focuses on two main factors for determining a landowner's liability: (1) the nature of the landowner's action or inaction which substantially contributed to the injured party's harm; and (2) the legal relationship of the injured party to the landowner.

A. The Landowner's Conduct: The Negligence Element

In theory, a landowner's legal responsibility to compensate an injured party is based in part on culpable conduct. This culpability may range from simple negligence, such as a failure to warn another of a danger which reasonable inspection would have disclosed, to maliciousness, such as setting booby traps along a fence row. The typical case involves negligence. The point along this spectrum at which the landowner becomes legally liable for the resulting injuries depends on the legal status of the injured party.

B. The Legal Status Element

Under common law, a landowner's duty of care to a person on his or her land varied, depending upon whether the person was an invitee, licensee, or trespasser.

1. Responsibility to invites and licensees: The reasonable care standard

The Maine legislature has abolished the distinction between "licensee" and "invitee" status. Therefore, a landowner generally owes the same duty of care to all persons lawfully on the landowner's land.[2] For example, a social guest invited to tea and a plumber hired to fix a sink would be owed the same duty of care under Maine law. A landowner must take all reasonable steps under the circumstances to protect such persons from harm.[3] Such reasonable steps include warnings of potentially dangerous conditions. However, if the danger should be obvious to the guest, a landowner is not liable unless the landowner should anticipate an injurious accident despite the obviousness.[4]

2. Responsibility to trespassers: The willful or malicious standard

Trespassers are those who use the land of another without consent, express or implied. In situations where measures to exclude individuals would be difficult and likely futile, the toleration of intruders is not consent.[5] With limited exceptions, a landowner has no legal obligation to make his property safe for trespassers. However, a landowner must refrain from willful or reckless harm to trespassers.[6]

Willful, malicious, or wanton conduct is difficult to define precisely. The best explanation of this concept in Maine law[7] is the following:

> Wanton misconduct ... cannot be entirely separated from negligence. The reckless act but not the infliction of injury is intended and so the injury or damage is accidentally suffered.[8]

Thus, such conduct tends to be an unreasonable and extreme departure from due care where the risk of injury is apparent.[9]

A recent case helps illustrate what is meant by "wanton" or "reckless" conduct in this context. Bonney v. Canadian Nat. Ry. Co.[10] involved the railroad's failure to take measures to protect persons using its railroad bridge when it knew that the bridge was very hazardous to pedestrians and that pedestrians frequently used the bridge. The Federal District Court ruled that this conduct, "failure to take anything beyond token measures to prevent injury to pedestrians," was a "callous indifference to a known condition of extreme danger to the public" which violated the minimal duty of care owed to trespassers.[11] The First Circuit Court of Appeals reversed this decision and held that, despite its awareness of the substantial danger, the railroad's failure to act did not make it liable for injuries to trespassers.[12] This decision indicates that liability will not attach even though the landowner fails to take steps to keep the premises reasonably safe for trespassers, particularly where the dangerous condition of the land is open and obvious.[13] Maine law categorizes the status of individuals using private lands with the owner's permission for recreational purposes as that of a trespasser.

In sum, a landowner has a legal obligation to those lawfully on his property to take all steps reasonable under the circumstances to make his property safe. Failure to take such precautions, i.e., failure to use "reasonable care," is a basis for liability. On the other hand, a landowner has no obligation to take any steps to make his land safe for trespassers. A landowner is liable for harm to trespassers only if they are harmed due to his deliberate and conscious disregard of known

serious risks. The distinction is roughly that between carelessness and recklessness.

III. THE LIMITED LIABILITY OF LANDOWNERS WHO ALLOW THE PUBLIC ACCESS TO THEIR LAND FOR RECREATION

A. Public Landowners: The State Of Maine And Maine Municipalities

This section discusses the liability of Maine and its municipalities regarding ownership, construction, maintenance, and/or operation of outdoor public recreation areas, including public access routes. The Maine Tort Claims Act (MTCA) [14] governs law suits against state governmental entities where compensation for injuries is sought. Although the structure and provisions of the MTCA are explained, detailed consideration of all its intricacies exceeds the scope and purposes of this guide. Primary attention is paid to those provisions which address issues involving the potential for imposition of liability in regard to public access.

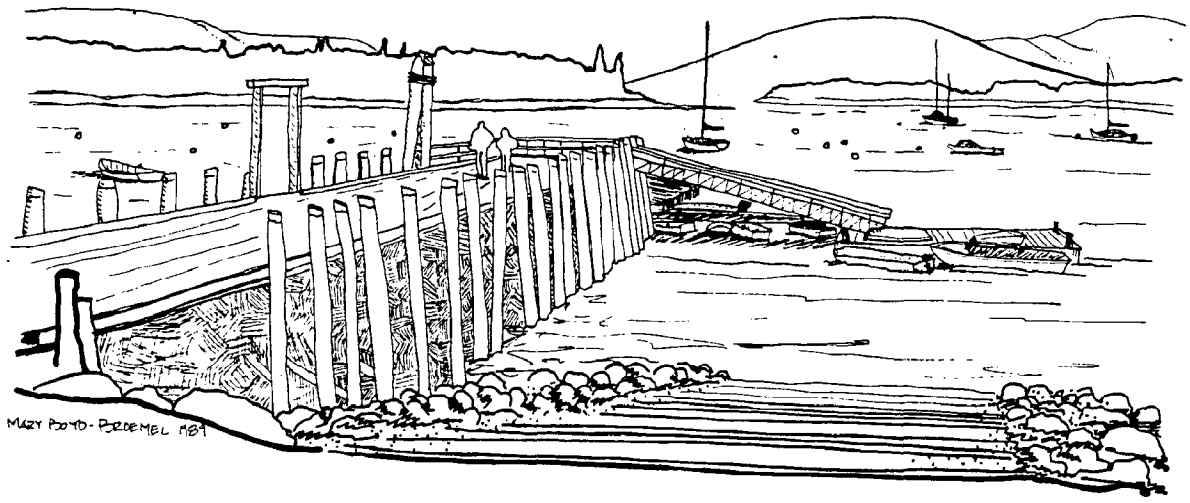

Figure 1: Municipal pier and boat launch ramp

The MTCA substantially reduces the liability risks of governmental entities. In other words, under most factual circumstances, Maine courts are unlikely to require the State or a municipality to pay money damages to a member of the public who is hurt while recreating on that entity's land.

1. The scope of the Maine Tort Claims Act: A limited waiver of sovereign immunity

a. Background: common law principles

Prior to the adoption of the MTCA, in Maine as in many other states, municipalities and the State itself enjoyed "sovereign immunity". Neither the State nor its municipalities were liable for injuries suffered as a result of negligent acts of its agents in connection with their "ministerial or governmental" actions; on the other hand, liability could be imposed in regard to the performance of "proprietary" functions. "Ministerial" functions are those which involve performance of duties imposed by law, such as operation of a fire department or police force. "Proprietary" functions involve activities pursued for profit, functions private business enterprises could and do provide, such as operation of a parking lot.[15]

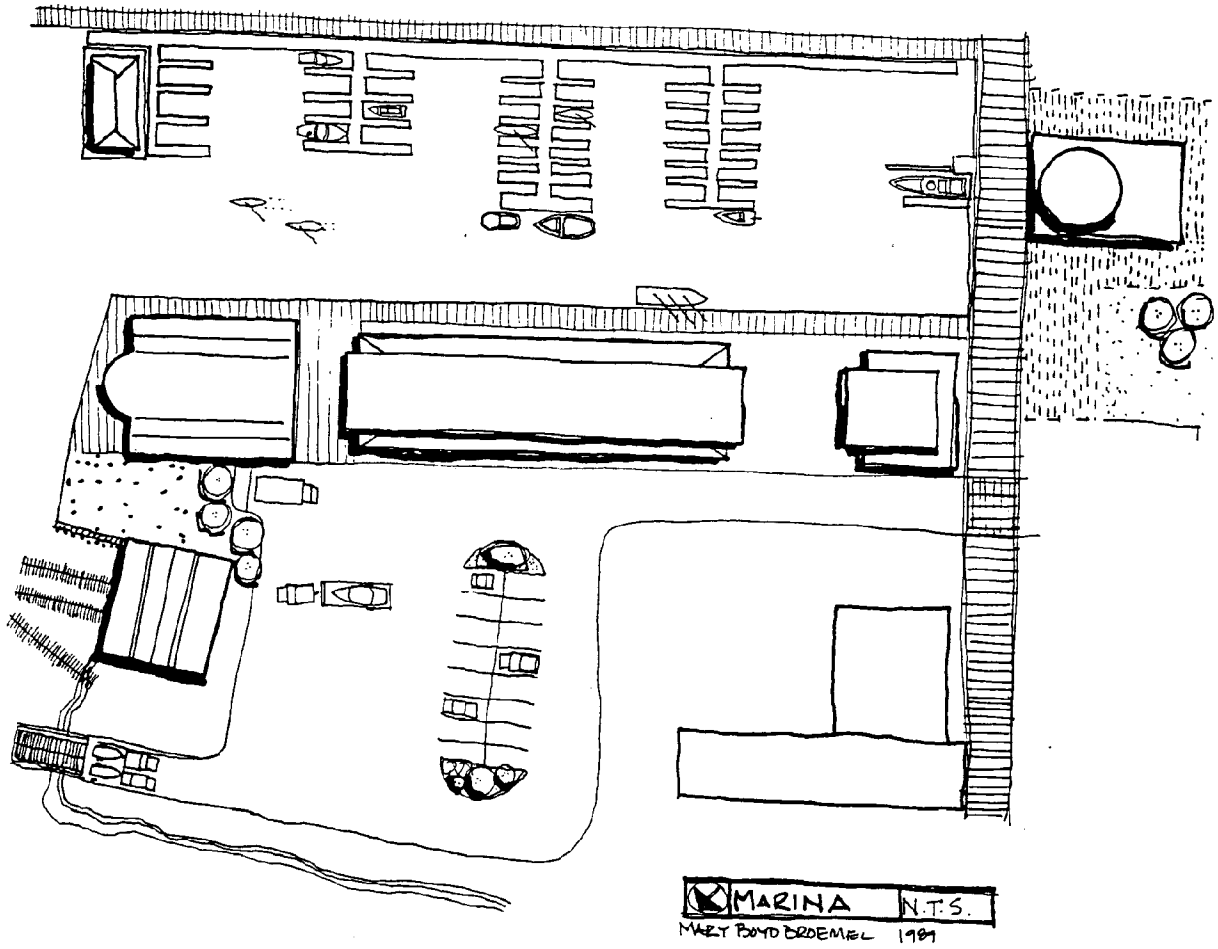

Figure 2: Marina or other proprietary facility

b. Instances in which Maine municipalities may now be liable

Under the Maine Tort Claims Act,[16] effective January 31, 1977, municipal liability is not determined on the basis of this "proprietary"/"ministerial" distinction.[17] The rules of liability established by the MTCA apply equally to the State and its political subdivisions. Immunity from liability "on any and all tort claims seeking recovery of damages..." is the general rule.[18] Instances in which the State or its towns may be held liable are laid out in the statute as exceptions to the general rule of immunity from suit. Under these statutory exceptions, "a governmental entity shall be held liable for its negligent acts or omissions causing property damage, bodily injury or death...." only in instances involving (1) operation of motor vehicles; (2) public buildings; (3) accidental discharge of environmental pollutants; and (4) construction, repair, and/or maintenance of highways, sidewalks or the like.[19] The Act authorizes wrongful death actions as well where one of the four exceptions applies.[20]

In keeping with the MTCA's structure and intent, the Law Court has indicated that these exceptions, waivers of sovereign immunity, will be narrowly construed.[21]

The MTCA lists a number of examples of situations where governmental entities will not be liable. One such example clearly demonstrates the legislature's intent to protect towns owning or maintaining public accessways or recreation areas from liability. The statute specifies that "[n]otwithstanding this section [8104-A], a governmental entity is liable for any claim which results from ... (t)he construction, ownership, maintenance or use of:

(1) Unimproved land;
(2) Historic sites, including but not limited to, memorials...; or
(3) Land, buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation...."[22]

Moreover, municipalities' liability for negligent acts involving public buildings and their appurtenances acquired for reasons of the tax delinquency by eminent domain is statutorily limited.[23]

Several factual scenarios may help illustrate the immunity afforded state governmental entities by these provisions. Should a town choose to acquire a parcel of unimproved land, or an easement to improve access to the shore, 14 M.R.S.A. § 8104-A(2)(A)(1) indicates that the town "shall not be liable for any claim" resulting from "the construction, ownership, maintenance or use" of the easement. For example, if a member

of the public walking along the easement is injured by a falling tree branch negligently trimmed by a municipal employee, the town could not be held liable. Imagine that a town chooses to build and operate a bathhouse on a municipally owned beach. If a beachgoer using the bathhouse (a structure "designed for use primarily by the public in connection with public outdoor recreation") slips on a slick floor and is hurt, 14 M.R.S.A. § 8104-A(2)(A)(3) forbids imposition of liability on the town. Obviously, situations could arise which present close factual issues as to the applicability of these immunity provisions. For example, if the "bathhouse" in the illustration above were in reality a storage building used by public works employees who had long shared it with beachgoers, one could reasonably question the town's assertion of immunity under the Act, since the building was not designed primarily for public recreational use.

Another limitation on the immunity intended under 14 M.R.S.A. § 8104-A(2)(A)(3) points out a potentially troubling anomaly. The immunity extends only to activities "in connection with public outdoor recreation." For example, suits to recompense injuries suffered in an indoor ice arena maintained by a school district are not barred; whereas, a similar outdoor skating rink is within the statute's scope.[24]

c. Entities covered by the Maine Tort Claims Act

The MTCA extends qualified immunity to certain state government units. In addition, government employees are shielded from personal liability to a certain extent.

(i) Governmental and quasi-governmental bodies

The sovereign immunity of Section 8103 of the MTCA, as qualified by Section 8104, applies to "all governmental entities" in the state. This term includes among others: (1) the State of Maine and all its instrumentalities, such as departments, agencies, boards, hospitals and other institutions;[25] and (2) political subdivisions of the State, including towns, cities, plantations, and special purpose districts.[26] Therefore, an entity specifically created by the State or a local government to purchase or manage municipally maintained recreational areas or public access routes would be likely to come under the MTCA protection.[27]

(ii) Governmental employees

Persons "acting on behalf of" the governmental units covered by the MTCA are "employees" who themselves enjoy a limited degree of immunity from suit.[28] Thus, to a large extent, towns can purchase and maintain recreational access routes without unduly exposing their employees to liability.

Whereas the MTCA establishes a general rule of immunity for governmental entities,[29] it generally holds employees liable for negligent acts committed in the scope of their employment.[30] Employees are subject to all claims arising out of a single occurrence; recovery is limited to $10,000 per claim.[31] Exceptions to this rule of liability are those "expressly provided by section 8111 or by any other law."[32]

Under Section 8111 of the MTCA, two factors are critical to determining an employee's liability: (1) the functional nature of her act; and (2) that act's relationship to the nature of her employment. Employees enjoy "absolute immunity" from civil liability for the following:

(1) "legislative or quasi-legislative acts," such as failure to enact an ordinance;

(2) "judicial or quasi-judicial acts," such as refusal to grant a permit;

(3) "discretionary functions or duties," such as performance of an act required by statute; and

(4) intentional action or omissions "within the course or scope of their employment," when the government unit is not subject to suit - unless the employee's acts were in "bad faith."[33]

Thus, a government employee may be held liable for her negligent actions that fall outside one of the above categories. However, under most circumstances when an employee is subject to liability for actions within the scope of her employment, a town will be required to assume the cost of her legal defense.[34] Moreover, in situations where the government entity may also be held liable, the town must indemnify the employee.[35] In other words, a town may be required to fully reimburse its employees for money spent in payment of a judgment and to retain, or pay for, a lawyer to represent its employee. In cases where the town itself may not be held liable, the decision to legally defend the employee is left to the town's discretion.[36]

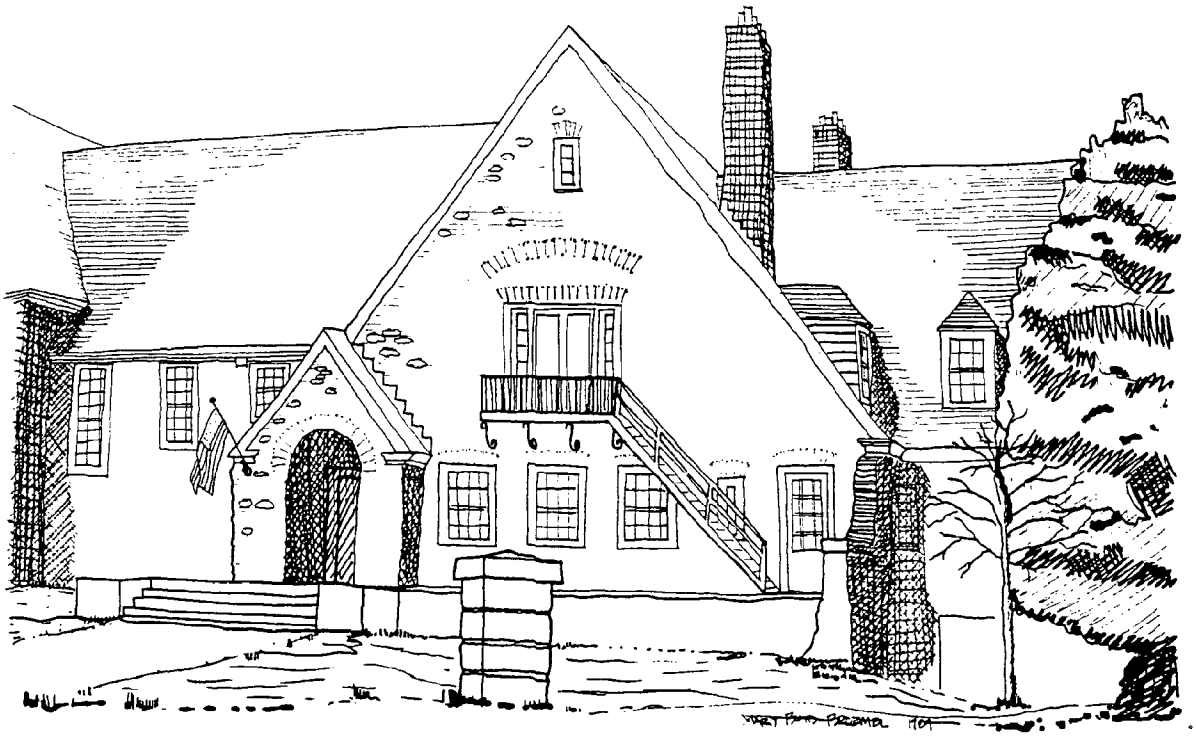

Figure 3: Municipal Building

Several Law Court decisions help illustrate the types of professional acts regarding which employees enjoy immunity from liability. In one example, school union superintendent's response to a request for an evaluation of a former employee, a public school teacher, was held not to be a discretionary function or duty; thus, the superintendent was subject to plaintiff's allegations of slander.[37] Execution of an arrest warrant involves a "ministerial" rather than a "discretionary" function; thus the MTCA's immunity was not available to defendant police officer.[38] In another example a police officer who told a criminal defendant that he would put in a good word for him only if he refrained from hiring a lawyer could not resort to the "discretionary" function immunity in defense of the lawyer's lawsuit for interference with an economic relationship.[39]

Finally, towns and their employees are potentially subject to suit under federal law notwithstanding the MTCA's provisions. The federal Civil Rights Act,[40] could allow recovery of damages, and attorneys' fees[41] where plaintiff's injuries stemmed from gross negligence or recklessness. It is very unlikely that plaintiffs suing under the Act could recover for injuries due to mere negligence.[42]

In sum, even under the MTCA, an employee's liability is determined on the basis of principles similar to those under common law, such as the "ministerial/ discretionary" distinction and whether given conduct was "within the scope of employment." Under Section 8104-D of the MTCA, negligent employees appear to face more risk of liability than their government employers. An employee's right in many instances to indemnification and costs of defending a lawsuit from his employer partially shifts the burden of this risk. The $10,000 limit on any single claim against an employee indicates that municipalities potential liability under these circumstances is far less than when the town itself may be held liable.

2. Additional elements necessary for imposition of liability under the Maine Tort Claims Act

Even if one of the narrow exceptions to municipal immunity applies, other provisions of the MTCA may, as a practical matter limit or reduce exposure to liability.

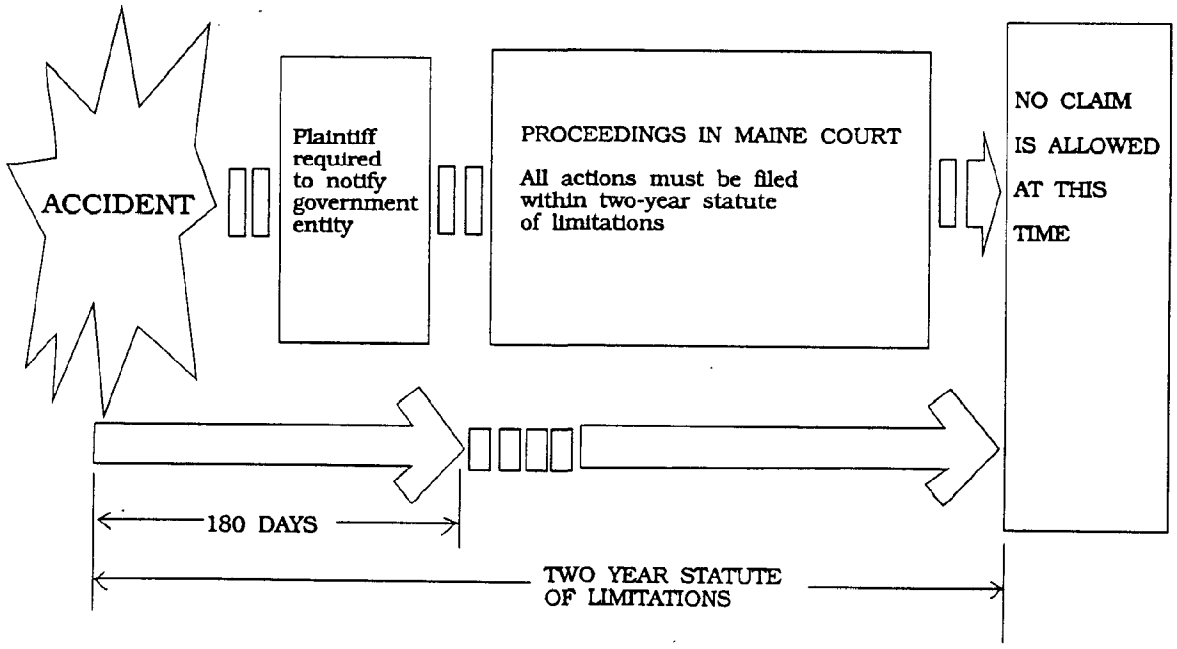

Figure 4: Window of Liability

First, in order to facilitate early settlement of claims, the MTCA requires that plaintiffs notify governmental entities of the nature of their claim within 180 days of the day their action accrued (typically the date of injury).[43] Plaintiffs who do not "substantially comply" with this prerequisite cannot maintain a lawsuit; however, the Act does allow for waiver of this deadline for "good cause" shown.[44] Maine courts have been strict in holding claimants to this deadline.[45] All actions must be filed within the two year statute of limitations.[46] The 6 month notice requirement and the two year statute of limitations create a comparatively narrow window during which towns face liability.[47]

Secondly, towns face a maximum liability risk of $300,000, including court costs (not attorneys' fees) per occurrence.[48] In other words, in a school bus accident injuring 40 school children, the children collectively could recover only $300,000. Although a far from negligible sum for most Maine towns, the number of situations involving public access in which towns risk such liability is negligible.[49] The statute also allows uninsured towns who must pay a liability judgment to spread that cost over as many as five years.[50] Liability insurance (discussed in section IV(B) below), is one method of managing the risk towns do face.

B. Private Landowners

By statute enacted in 1978, the Maine legislature has greatly limited the liability of private landowners who provide the public with access to their land.[51] In those situations where the statute does not apply, landowners must turn to the general liability principles discussed above to evaluate the risks they face.

Maine's statute limiting landowner liability is apparently based on model legislation recommended by the Council of State Governments.[52] Forty-one other states have adopted similar legislation limiting the liabilities of landowners who allow the public access to their land for recreational purposes.[53] Although in some respects these statutes differ significantly from Maine law, cases construing them offer some guidance on issues as yet unaddressed by Maine courts.

1. The statutory liability limitation

a. Basic provisions

14 M.R.S.A. § 159-A provides that:

> An owner, lessee or occupant of premises shall owe no duty of care to keep the premises safe for entry or use by others for recreational or harvesting activities or to give warning of any hazardous condition, use, structure or activity on

these premises to persons entering for those purposes.

In effect, the law treats those on another's land for "recreational or harvesting activities" as "trespassers" to whom no affirmative duty of care is owed. Accordingly, the private landowner who chooses to allow the public on his land is under no legal obligation to maintain his property in a safe condition or to warn about potential dangers, e.g., rotting tree limbs, wire strand fences, or rotting bridges.

The statute also extends similar protection to "an owner, lessee or occupant who gives permission to another to pursue recreational or harvesting activities on the premises...."[54] Whereas Maine law would otherwise treat such a person as an "invitee" to whom an affirmative duty of due care is owed,[55] this section declares that the landowner's permission does not "[m]ake the person to whom permission is granted an invitee or licensee...."[56] Moreover, the landowner is ordinarily not liable for any injuries to persons or property caused by another to whom permission to enter was also granted.[57]

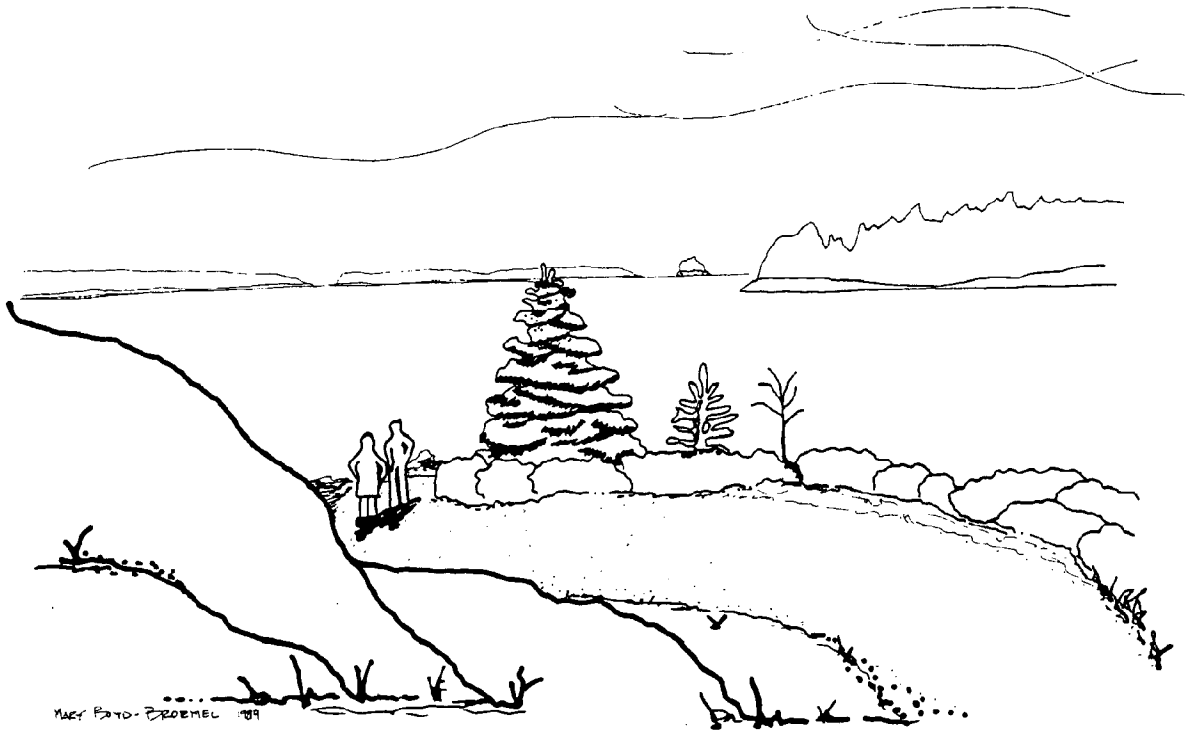

Figure 5: Pathway to water

"trespasser": (1) the case of the child trespasser; and (2) the case of the "misled" trespasser. These potential exceptions to the general 'no duty to trespassers' rule also present liability risks to abutters, landowners whose property adjoins or is nearby public accessways. However, under 14 M.R.S.A. § 159-A, neither of these theories appears to increase landowners' liability risks significantly.

(i) The child trespasser

Certain jurisdictions impose liability on landowners for injuries to child trespassers under the "attractive nuisance doctrine." The doctrine's theoretical justification is questionable; liability is based on the notion that an enticing danger lured the child to harm on the landowner's property. Moreover, if the one Maine Superior Court decision on this point is generally followed, child recreational users present no additional risk of liability.

Maine does not recognize attractive nuisance per se as a basis for liability. Yet Maine law does have a different standard of liability in regard to trespassing children. A landowner is subject to liability for injuries to a child caused by an "artificial condition" on her land if:

(1) the condition is in a place onto which the landowner knows or should reasonably know that children will trespass;

(2) the landowner knows, or should, that the condition poses an unreasonable risk of serious bodily injury;

(3) the children, due to their age and inexperience, fails to perceive the danger;

(4) the utility and burden of maintaining the condition as it is are slight compared with the magnitude of the risk it threatens to children; and

(5) the landowner fails to take reasonable steps to eliminate the danger or protect children from it.[58]

The duty of care owed to child trespassers, though greater than that owed to other trespassers, is less than that owed to those lawfully on one's land. A landowner is in effect responsible only for attention to "artificial conditions," for example, a well as opposed to a pond, involving unreasonable risks of serious bodily injury to minors.[59]

In a recent decision, Stanley v. Tilcon Industries, Inc.,[60] a Maine court faced this issue for the first time and held that Maine landowners do not owe children trespassing on their land

for recreational purposes this heightened duty of care in regard to "artificial conditions".[61] In Stanley, Superior Court Justice Lipez ruled that "the plain language of 14 M.R.S.A. § 159-A declares that [the 'attractive nuisance' doctrine announced in Jones, supra] no longer apply(s) when individuals, young or old, enter the premises of another for recreational or harvesting activities." The court reasoned that if the legislature had intended to exclude children from 14 M.R.S.A. § 159-A's liability limitation it would have done so in 14 M.R.S.A. § 159-A(4), the section describing the limited instances where landowners remain liable.[62] In other words, the rules of landowner's liability in regard to recreational uses are governed by 14 M.R.S.A. § 159-A; no affirmative duty of care is owed to recreational users, whether children or adults. Although the court noted that courts in other jurisdictions have construed recreational use statutes to allow claims based on an "attractive nuisance" theory, the court rejected those cases as based on different statutory provisions and unpersuasive.[63] Until this issue is resolved by the Law Court, child trespassers pose a potential liability problem, or at least risk of litigation, to landowners. However, the reasoning in Stanley appears sound.

(ii) "Misled" doctrine

There is another legal doctrine by which courts sometimes hold landowners liable for injuries to those who stray onto their land. The "misled" doctrine provides that if a person, misled into thinking that private land is actually part of a public way, enters and is injured, the possessor of that land may be held liable. The underlying policy notion appears to be that by maintaining his property in a misleading character (e.g., A's driveway looks like a public road), a landowner implicitly invites others onto his land. Under this legal doctrine, those who stray are not trespassers but invites.

Maine law appears to recognize the misled doctrine. In Beckwith v. Somerset Theatres, Inc.,[64] the Law Court held that a landowner whose land abutting a public road had been surfaced just as the road could be held liable for injuries to a woman who mistakenly drove onto his land and was injured when she struck an unmarked lot marker. The Court reasoned that the plaintiff driver was a misled invitee.

In the context of public outdoor recreation, this doctrine, like the attractive nuisance doctrine, does not appear to enhance liability risks significantly, as the following example analogous to the situation in Beckwith explains. Relying on the misled doctrine, one might argue that a landowner abutting a public recreational easement, the boundaries of which are

ill-defined and which closely resembles the abutting lands, is liable for injuries to those who, believing they are on the easement, wander off onto the private land and are injured. However, 14 M.R.S.A. § 159-A limits landowners' liability as to those who are invited onto one's land as well as trespassers. Moreover, a landowner has no duty to keep his property in a safe condition for such persons. Thus, acquisition of invitee status through the "misled" doctrine is not helpful to the recreational user under 14 M.R.S.A. § 159-A.

2. The statute's scope

14 M.R.S.A. § 159-A does not remove liability for injuries to all persons on one's land for all purposes. The limits on the Act's applicability are expressly declared in 14 M.R.S.A. § 159-A(4)(A)-(C). In addition, definitions of key terms in the Act indicate other limitations.

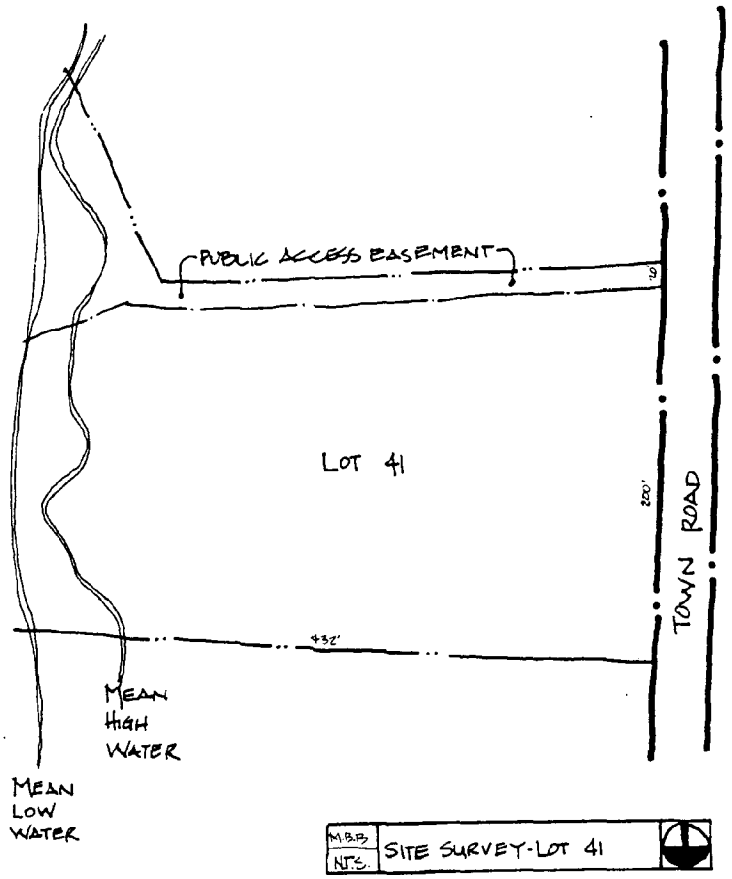

Figure 6: Site plan showing public access easement

a. Definitional limitations

(i) "Premises"

The statute by its terms applies only where an injury is incurred on an owner, lessee, or occupant's "premises". This locational limitation appears broad. "Premises" are defined in the statute as "improved and unimproved lands, private ways, any buildings or structures and those lands and waters standing on, flowing through or adjacent to those lands."[65] Although similar statutory protections have been held applicable only in semi-rural or rural settings,[66] Maine's statutory language does not appear to support this distinction; 14 M.R.S.A. § 159-A by its terms applies to both improved and unimproved land. Also, even though the statute covers activities on any buildings or structures on the property, the statute's definition of "recreational or harvesting activities" makes it plain that situations where a landowner invites another into his home are not covered.

(ii) "Recreational or harvesting activities"

A landowner's liability is limited only when another has entered her land to pursue "recreational or harvesting activities," a non-exclusive list of which is contained in the statute.[67] The liability limit applies only to "out-of-doors" activities such as "hunting", "fishing", "sight-seeing", and "rafting", and "activities that involve harvesting or gathering forest products." The term also includes "entry, use of and passage over premises in order to pursue these activities."[68] Thus, for example, a landowner who grants an easement over his land to allow the public access to a lakefront is entitled to the statute's protection; users need not actually recreate on his land.

The issue of what constitutes "recreation" for the purposes of 14 M.R.S.A. § 159-A has been litigated. In Schneider v. United States,[69] the U.S. Court of Appeals for the First Circuit, applying Maine law under the Federal Tort Claims Act,[70] upheld the district court's summary judgment ruling that the U.S. Government was not liable for plaintiff's injuries, sustained when she was making her way down some steps to Sand Beach at Acadia National Park. The court rejected out of hand plaintiff's argument that going to the Park to drink a cup of coffee was not a "recreational ... activity."[71] The court noted that the list of activities contained in the Maine statute[72] "is only illustrative"; other recreational activities such as "birdwatching", "sun bathing", and "playing ball" are also covered.[73] The court's refusal to read the statute restrictively was based in part on its determination of the

statute's purpose: "to allow a landowner to permit broad uses of his land without incurring the obligations of a common law licensor."[74] Finally, the court noted that even if a plaintiff demonstrates her presence was not tied to a recreational purpose, she must "prove some other authorization"; otherwise, as a trespasser she is owed no affirmative duty.[75]

Courts in other jurisdictions have also considered the scope of "recreational" activities under statutes similar to 14 M.R.S.A. § 159-A.[76]

Figure 7: Beach goers

Although they have not squarely faced this issue, Maine courts applying 14 M.R.S.A. § 159-A have been[77] and are likely to continue to be protective of landowners. The statute's history supports the courts' efforts to realize this public policy. The Legislature has repeatedly widened the scope of activities for which landowners are not liable.[78] A 1985 amendment allows landowners who are sued and are found not legally liable to recover their costs and expenses, including attorneys' fees, from the person bringing suit.[79] Quite plainly, the Legislature intends, in the interest of promoting public access and recreation opportunities, that the protections of 14 M.R.S.A. § 159-A be liberally construed to protect landowners.

b. Elements of landowner's liability

14 M.R.S.A. § 159-A(4) spells out three situations in which,

owner receives compensation for the use of his land; or where the injured party, an invitee of the landowner, is injured by a recreational user.

(i) Willful or malicious standard

Even though a landowner has no duty to inspect and maintain his property in a safe condition for recreational users, the courts may hold a landowner liable for "willful or malicious" failure to guard or warn such users against dangerous conditions on his land.[80] This standard is similar to Maine's rule regarding civil liability for injuries to trespassers. A decision by the Law Court indicates that in order to satisfy the "willful or malicious" standard of 14 M.R.S.A. § 159-A(4)(A) plaintiffs must prove a high degree of malfeasance on the part of the landowner to avoid an adverse decision on summary judgment.[81] Decisions construing similar recreational use statutes in other states may provide some guidance on the level of malfeasance required for willful or malicious conduct.[82]

(ii) "Consideration"

Landowners who charge a fee or exact other "consideration" in exchange for allowing others onto their land remain subject to Maine's law regarding liability to invites.[83] For example, a ski resort which charges skiers for the use of its slopes and facilities is liable for its customers' injuries stemming from the negligence of resort employees. A landowner who charges a fee for people to enter his land and harvest standing timber also faces potential liability under this section.

The one Maine decision on this issue, Spencer v. Condon,[84] narrowly construed the "consideration" exception.[85] Spencer involved the following facts. Plaintiff had paid a $3 entry fee to watch a "mud run" on defendant's property. While at the event, plaintiff got on an ATV, drove off defendant's land, and onto another parcel, a gravel pit, owned by the defendant. Heedless of where he was going, plaintiff drove the ATV over a steep embankment and suffered permanent injuries. Superior Court Justice Alexander ruled that, since the $3 was paid to watch the "mud run," not to ride an ATV, and since the injury occurred on another property than that to which plaintiff had been admitted for a fee, 14 M.R.S.A. § 159-A(4)(B) was inapplicable.[86] Thus, the court ruled in favor of the defendant landowner.

In addition, under the facts of this case, the court ruled that Maine's comparative negligence statute,[87] which bars recovery where a plaintiff's contribution to his own harm was greater than or equal to that of the defendant, posed an

independent basis for finding for the defendant. In other words, if a person is injured while lawfully on one's land due largely to her own negligent or reckless acts, the law does not hold the landowner responsible.

(iii) Independent duty

Under circumstances where a landowner owes a duty of care to one on his land, and that person is injured by another to whom the landowner has given permission to enter for recreation or harvesting activities, the landowner could be held liable.[88] The following example, derived from the facts of Spencer, supra, illustrates this principle of vicarious liability. Imagine that Spencer, who had paid to enter Condon's land, was struck while watching the "mud run" by a dirt biker to whom Condon had given permission to use his land. Condon owes Spencer a duty of reasonable care, since he has paid for admission to Condon's land.[89] 14 M.R.S.A. § 159-A(4)(C) makes it clear that Condon is potentially responsible for the actions of a recreational user permitted on his land when that user harms one to whom Condon has a legal obligation.[90] Likewise, Condon would be potentially liable for injuries to a backhoe operator hired to repair culverts on his land (an "invitee") if he were struck by the dirt biker.

Figure 8: Landowners warning

IV. RISK MANAGEMENT TECHNIQUES

Maine law substantially reduces but does not completely eliminate the risk that landowners who provide or facilitate public recreational access will be held liable for injuries to those who are injured on their land. However, the situations in which such landowners may be held liable are few and have been narrowly construed by Maine courts. Maine municipalities should be aware that purchase of liability insurance may actually increase the cases in which they can be successfully sued. Nevertheless, landowners may wish to take steps to minimize the risks they do face. Some of these protective measures may involve little or no expense. Others, such as the purchase of liability insurance, may require a more substantial expenditure.

A. Susceptibility To Suit Versus Susceptibility To Liability

Provisions in Maine law limiting landowners' liability do not guarantee that the landowner will not be forced to assert his rights in defending against a lawsuit. Plaintiffs' lawyers can be counted on to devise novel theories aimed at securing compensation for their clients. However, several factors may limit the number of such lawsuits filed, especially under the limitation on landowners' liability act.[91] First, Maine courts have restrictively interpreted 14 M.R.S.A. § 159-A and recognized it as a device which facilitates public recreational access by shielding landowners from liability for simple negligence. This fact may discourage attempts to recover from such landowners. Notably, there are only four reported cases construing 14 M.R.S.A. § 159-A and none dealing with the recreational provisions of the MTCA. Also, in each of the four reported cases concerning 14 M.R.S.A. § 159-A, the landowners' motions for summary judgment have been granted. Thus, even though the costs associated with bringing a case to that stage may be far from negligible, landowners did not incur the expense of a trial.

Secondly, certain landowners may be able to recover legal costs from the unsuccessful plaintiffs. The Legislature, recognizing that landowners may still be forced to defend these statutory rights, amended the landowners' liability act to allow landowners' who are "found not to be liable for injuries to a person or property pursuant to this section" to recover "any direct legal costs," including attorneys' fees, from the plaintiff.[92] This provision may substantially reduce the final cost of defending against law suits.[93] The MTCA, however, contains no similar provision.

Finally, in the case of frivolous or malicious lawsuits filed with no good faith belief that there are grounds for the suit, any landowner may be able to recover "the amount of the

reasonable expenses incurred because of the filing," including attorney's fees, pursuant to Maine's civil procedure rules.[94]

B. Liability Insurance

Liability insurance is one method of managing risk. Municipalities should be aware that under the MTCA, purchase of liability insurance may affect not only the extent of their liability but the types of situations in which they may be held liable. Private landowners may also wish to insure against liability for accidents. Before purchasing additional coverage, however, such landowners should determine the scope of limits of any existing insurance policies they hold.

1. Public landowners

The Maine Tort Claims Act provides for the purchase of liability insurance by governmental entities, including municipalities through the Maine Insurance Advisory Board.[95] The MTCA permits municipalities and others to purchase insurance against any potential claim under the Act; thus, conceivably, towns could insure themselves against liability associated with public recreational access areas. Before towns make this decision, they should carefully consider how the purchase of insurance will alter the nature of their liability under the MTCA. In many instances, the immunity provisions of the MTCA are inappropriate because a town has purchased insurance coverage.

First, the liability limits in an insurance policy purchased by a town affects the dollar limit of a town's liability.[96] For example, if a town buys a $5,000,000 policy covering a municipal beach accessway, the aggregate limit of its liability becomes $5,000,000. On the other hand, if the town purchased a $200,000 policy, its liability limit remains $300,000, the amount established by the MTCA.

Secondly under the MTCA, purchase of liability insurance may actually reduce the immunity of the purchasing town. 14 M.R.S.A. § 8116 (emphasis added) provides that "[i]f the insurance provides coverage in areas where the governmental entity is immune, the government shall be liable in those substantive areas but only to the limits of the insurance coverage." This provision is especially relevant to public access. The MTCA indicates that towns are immune from liability resulting from injuries on "unimproved land," "historic sites," or "land, buildings, structures, facilities or equipment designed for use primarily in connection with public outdoor recreation."[97] For example, an easement purchased and maintained by a town to create lakefront access for the public is quite clearly "land ... designed for use primarily in connection with outdoor recreation." By the terms of section

8116 of the MTCA, if a town purchased insurance against injuries in connection with this easement it would have waived its immunity to the extent of the liability coverage. Towns considering public access options should carefully weigh the economic risk of forgoing purchase of insurance (by evaluating the likelihood of accident, resulting law suits, and associated expenses in light of their limited liability under the MTCA and existing insurance coverage) against the cost of additional liability insurance. A recent decision[98] demonstrates how this provision operates to remove municipal immunity under the MTCA.

Finally, towns should recognize that under the MTCA, purchasing liability insurance in relation to public access amounts to a significant public policy decision. In some instances where a town may be found liable, the $300,000 recovery limit set by the MTCA may be inadequate to compensate the injured party. Towns may wish to shoulder the additional expense of insurance in the interest of protecting its residents and the general public. For the same reason, a town may wish to purchase insurance to waive its immunity and allow injured recreational users readier access to compensation through the town's liability coverage. Also, liability insurance contracts very often require the insurer to assume the legal expense of defending the insured. Thus, insurance coverage may be a cost-effective means of defraying legal expenses. Finally, a town may wish to consider having an endorsement placed on its insurance policy excluding coverage for claims for which the town is immune under the MTCA. Such an endorsement should specifically state the factual circumstances, derived from 14 M.R.S.A. § 8104-A(2)(A), for which coverage is excluded.[99]

2. Private landowners

Private landowners' motivations for seeking insurance against injuries to public recreational users are akin to those of public landowners. These landowners are also faced with a small chance of being found liable; however, in the unusual circumstances that they are found liable, the magnitude of their liability may be great and is unlimited by statute. Before considering buying additional liability insurance, a landowner who allows the public access to his land should determine whether or not his homeowner's policy would cover injuries to such users. An insurance agent and a lawyer can help with this decision. If coverage is non-existent, too limited, or ambiguous, purchase of additional insurance may be advisable. Although insurance is typically a seller's market, the limited risk of liability could make the cost of sufficient coverage reasonable.

In some instances, a landowner may wish to establish a public access easement across her property in exchange for a town's agreement to indemnify her in the event of a lawsuit,

notwithstanding the immunity afforded by 14 M.R.S.A. § 159-A. Obviously, a town should discuss assumption of any additional liability with legal counsel. However, it appears that by agreeing to such an arrangement, a town assumes only a small risk of liability. The town's duty to pay would be triggered only if the landowner is found liable under 14 M.R.S.A.§ 159-A - an highly unlikely event in the case of simple negligence. The indemnification agreement could exclude municipal responsibility where an injury resulted from the landowner's wanton or malicious acts, as well as where the landowner exacted a fee, or where the injured party was one to whom the landowner owed an independent duty. The agreement should be drafted to allow a town which defends a landowner to take advantage of the Act's fee recovery provision.[100] On the other hand, if the agreement indicates that the town has assumed responsibility for "construction, ownership, maintenance or use of" the easement, the MTCA[101] provides municipal immunity from negligence claims. Towns must recognize that purchase of liability insurance covering the easement will negate any immunities provided by the MTCA.[102]

C. "Ounces Of Prevention"

Virtually no landowner wants people to be hurt on his land. Even though the law may not require them, some simple and perhaps obvious steps may help reduce the odds of injury. Landowners who are aware of dangers on their land may wish to post signs to warn the public. However, the legal effect and practical effectiveness of posting may be questionable. In Gibson v. Keith,[103] the Delaware Supreme Court ruled that "a landowner who undertakes affirmatively either to warn or bar the public from entry cannot assert the statute as a bar to a tort claim brought by a person who has entered the premises either with knowledge or in disregard of the owner's efforts to keep the public out." Note, however, that Delaware statute at issue, unlike 14 M.R.S.A. § 159-A, was identical to the Model Act.[104] Moreover, the Delaware court, dividing the existing recreational use statutes into four groups, reasoned that landowners who took affirmative steps to bar trespassers could raise a statute such as 14 M.R.S.A. § 159-A as a bar.[105]

Landowners might want to inspect the areas in which they allow the public to roam, and remove accidents waiting to happen. Municipal landowners should make a habit of regular maintenance and attention to public facilities. Common sense and conscientious precautionary measures may well be the best antidote to risks of liability.

V. CONCLUSION

The Maine Legislature has significantly altered traditional, common law rules regarding landowners' liability. In general, landowners owe a duty of reasonable care to all persons lawfully on their land. Although they owe no affirmative duty to trespassers, the law requires that they refrain from willfully or maliciously setting "traps" to harm trespassers.

The Legislature has also acted to limit the liability of landowners who allow the public to use their property for outdoor recreation. The liability of governmental entities providing public access is governed by the Maine Tort Claims Act. 14 M.R.S.A. § 159-A, based on a model act adopted in 41 jurisdictions, covers the liability of private landowners. Both statutes narrowly limit the instances in which the landowner may be held liable.

Private landowners are generally not liable for injuries to recreational users on their land whether those users were given permission or were trespassers. Private landowners remain liable for willful or malicious harm to recreational users; harm to users who have paid a fee for use of the property; and harm, caused by a recreational user, to one to whom a landowner owes a duty of care.

The Maine Tort Claims Act makes governmental entities immune from suit resulting from construction, maintenance or use of outdoor public recreational facilities; activities on unimproved lands; and use of historic monuments. Thus, municipalities and other government units should be immune from suit in most situations involving injury to outdoor recreational users. Government employees are also partially immune from suit. In those instances where an employee may be sued, the governmental entity may often be required to pick up the cost of defending that lawsuit and, less often, to indemnify the employee. The MTCA contains stringent notice requirements and an overall liability limit of $300,000.

Maine law does not entirely eliminate the liability risks of landowners in regard to public outdoor recreation. Landowners may wish to take practical steps such as policing their property to limit their liability further. Purchase of liability insurance is another option. Private landowners, prior to purchasing additional insurance, should determine the scope of existing coverage under any homeowner policies they hold. Public landowners should be aware that purchase of liability insurance may alter the scope of the immunity granted by the MTCA and affect the monetary limit on their liability.

In short, towns and private landowners should not consider the risk of liability prohibitive of creative and expanded efforts to furnish much needed recreational access in Maine.

NOTES

1. The term "landowner" is used for convenience. The Act Limiting Landowners Liability, 14 M.R.S.A. § 159-A(2), makes it clear that the rights of "owners, lessees, and occupants" are governed by its provisions.

2. 14 M.R.S.A. § 159; see Poulin v. Colby College, 402 A.2d 846, 850-51 (Me. 1979); Erickson v. Brennan, 513 A.2d 288, 289-90 (Me. 1986).

3. Poulin, supra.

4. Isaacson v. Husson College, 297 A.2d 98, 105 (Me. 1972); see also Ferguson v. Britten, 375 A.2d 225, 227 (Me. 1977) (actual notice of danger by plaintiff not determinative of liability issue).

5. See Prosser, Law of Torts, 378 (4th ed. 1971).

6. U.S. v. Shultz, 282 F.2d 628, 631 (1st Cir. 1960); Bonney v. Canadian National Railway Co., 613 F.Supp 997, 1002 (D. Me. 1985), rev'd 800 F.2d 274 (1st Cir. 1986).

7. See Bonney, supra at 1006.

8. Blanchard v. Bass, 153 Me. 354, 361-62 139 A.2d 359 (1958).

9. See Prosser, The Law of Torts, § 34 at 184-85 (4th ed. 1971), cited in Bonney, supra at 1006.

10. See supra note 6

11. Id. at 276 (citing and quoting from district court decision).

12. Id. at 277.

13. Id. Jordon v. H.C. Haynes, Inc., infra note 77.

14. 14 M.R.S.A. §§ 8101-8818. The MTCA was recently amended. See P.L. 1988, ch. 740, 113th Legislature, Second Regular Session. References to the MTCA in this memo give the section numbers as revised by P.L. ch. 740.

15. See Martin, Common Law, Sovereign Immunity and the Maine Tort Claims Act, 35 Me. Law Rev. 266, 266-81 (1983) for a cogent analysis of the relevant common law principles. (Martin suggests that the MTCA may actually provide broader immunity to Maine municipalities than under common law.)

16. Supra note 14.

17. Note, however, that this distinction may have some continued relevance in interpreting some of the MTCA's provisions. See infra Section III.A.1.c.ii.

18. 14 M.R.S.A. § 8103(1).

19. See 14 M.R.S.A. § 8104-A. The precise language of the statute should be consulted.

20. 14 M.R.S.A. § 8104-C.

21. Goodwin v. State, 468 A.2d 1002, 1004 (Me. 1983); Clockedile v. State Dep't of Trans., 437 A.2d 187, 189 (Me. 1981); see McNally v. Town of Freeport, 414 A.2d 904, 906 (Me. 1980) (hypodermic needle not "other ... equipment" under 14 M.R.S.A. § 8104(1)(b); thus, town immune from suit).

22. 14 M.R.S.A. § 8104-A(2)(A)(1)-(3).

23. 14 M.R.S.A. § 8104-A(2)(B).

24. See Martin, supra at 288 for use of this example in illustrating the potential policy problems posed by this indoor/outdoor distinction.

25. See 14 M.R.S.A. § 8102(2), (3).

26. See 14 M.R.S.A. § 14 M.R.S.A. § 8102(2), (4).

27. See Fitzpatrick v. Greater Portland Development Comm'n, 495 A.2d 791, 793 (Me. 1985) (Development Commission made a "State Agency" by legislative act, covered by MTCA).

28. See 14 M.R.S.A. § 8102(1) (definition of employee).

29. 14 M.R.S.A. § 8103(1).

30. 14 M.R.S.A. § 8104-D.

31. Id.

32. Id.

33. See 14 M.R.S.A. § 8111(1)(A)-(D), as amended by P.L. 1988, ch. 740 (according employees "absolute immunity" in regard to the listed actions.)

34. See 14 M.R.S.A. § 8112.

35. See 14 M.R.S.A. § 8112(2).

36. 14 M.R.S.A. § 8112(1).

37. True v. Ladner, 513 A.2d 257 (Me. 1986).

38. Kane v. Anderson, 509 A.2d 656, 656-57 (Me. 1986).

39. MacKerron v. Madura, 474 A.2d 166, 167 (Me. 1984).

40. See 42 U.S.C. § 1983.

41. See 42 U.S.C. § 1988.

42. See Daniels v. Williams, 474 U.S. 327 (1986).

43. 14 M.R.S.A. § 8107(1); See Faucher v. City of Auburn, 465 A.2d 1120, 1123 (Me. 1983). Correspondingly, governmental employees must comply with statutory notice provisions to benefit from the MTCA indemnity and defense provsions. See 14 M.R.S.A. § 8112; 8112-A.

44. 14 M.R.S.A. § 8107(1), (4).

45. See, e.g., Faucher, supra at 1123 (mother's discussion of child's injury and accident with school's employee's insufficient "notice" under MTCA) but; cf. Nadeau v. City of South Portland. 424 A.2d 715, 716 (Me. 1981) (discharging the Superior Court's report for interlocutory ruling, the Law Court reasoned that the "good cause" exception involves determination of questions of fact reviewable on cearly erroneous standard; thus, where Superior Court failed to explain basis for "good cause" determination, Court could not review the finding. The case does suggest that in certain situations the notice provision of section 8107 will be contrued liberally to allow recovery. Here, a claim was filed against the City 22 months after the injury on behalf of a retarded minor.)

46. 14 M.R.S.A. § 8110.

47. In Maine, the general statute of limitations for civil actions is 6 years.

48. This amount may be increased by legislative act in a given case. 14 M.R.S.A. § 8105(3).

49. See section III A(1)(b) supra.

50. 14 M.R.S.A. § 8115(2).

51. 14 M.R.S.A. § 159-A.

52. See Council of State Governments, Suggested State Legislation, Vol. XXIV, 150-152 (1965).

53. Ala. Code §§ 35-15-1 to 35-15-20 (Supp. 1982); Ark. Stat. Ann. §§ 50-1101 to -1107 (1971); Cal. Civ. Code § 846 (West 1982); Colo. Rev. Stat. §§ 33-41-101 to -105 (1973); Conn. Gen. Stat. Ann. §§ 52-447(f) to -557(k) (West Supp. 1982); Del. Code Ann. tit. 7 §§ 5901-5907 (Supp. 1970); Fla. Stat. Ann § 375.251 (West 1974 & Supp. 1982); Ga. Code Ann. § 51-3-20 to -23 (changed from § 105); Ill. Ann. Stat. ch. 70, §§ 31-37 (Smith Hurd Supp. 1982-1983); Ind. Code Ann. §§ 14-2 to -6-3 (Burns 1982); Iowa Code Ann. §§ 111C.1 -.7 (West Supp. 1982-1983); Kan. Stat. Ann. §§ 58-3201 to -3207 (1976); Ky Rev. Stat. Ann. § 150.645 (Baldwin 1981); La. Rev. Stat. Ann. §§ 9:2791 (West 1965); Me. Rev. Stat. Ann. tit. 14 § 159-A (1980 & Supp.1982-1983); Md. Nat. Res. Code Ann. §§ 5-1101 to -1108 (1974 & Supp. 1982; Mass. Gen. Laws Ann. ch. 21 § 17-C (West 1981); Mich. Comp. Laws Ann. § 300.201 (West Supp. 1982-1983); Minn. Stat. Ann. § 87.01-0.3 (West 1977); Mont. Code Ann. § 70-16-301 to -302 (1981); Neb. Rev. Stat. §§ 37-1001 to -1008 (1978); N.H. Rev. Stat. Ann. § 212:34 (Supp. 1979); N.J. Stat. Ann. §§ 2A:42 A-2 to -5 (West Supp. 1982-1983); N.M. Stat. Ann. §§ 17-4-7 (197-8); N.Y. Gen. Oblig. Law § 9-103 (McKinney 1978 & Supp. 1981-1982); N.D. Cent. Code §§ 53-08-01 to -06 (1982); Ohio Rev. Code Ann. §§ 1533.18-.181 (Page 1978 & Supp. 1982); Okla. Stat. Ann. tit. 76 §§ 10-16 (West 1976); Ore. Rev. Stat. §§ 105.655 -.680 (1981); Pa. Stat. Ann. tit. 68, §§ 477.1-.8 (Purden Supp. 1982-1983); S.C. Code Ann. §§ 27-3-10 to -70 (Law Co-op, 1976); Tenn. Code Ann. §§ 11-10-102 -103 (1982); Vt. Stat. Ann. tit. 10 § 5212 (1973); Va. Code § 29-130.2 (Supp. 1982); Wash. Rev. Code Ann. §§ 4.24.200-.210 (Supp. 1982); W. Va. Code §§ 19-25-1 to -5 (1977); Wis. Stat. § 895.52 (1983); Wyo. Stat. §§ 34-389.1-6 (Supp. 1975); Utah § 57-14-1. Three states enacted recreational use statutes but later appealed them. See N.C. Sess. Laws 830, § 11 (repealed 1980); S.D. Codified Laws Ann. § 20-9-5 (repealed 1987); Tex. Rev. Stat. Ann. art 1B (repealed 1985).

54. 14 M.R.S.A. § 159-A(3)

55. See 14 M.R.S.A.§ 159.

56. 14 M.R.S.A.§ 159-A(3)(B).

57. 14 M.R.S.A. § 159-A(3)(B).

58. Jones v. Billings, 289 A.2d 39, 41-43 (Me. 1972) (adopting the standard of the Restatement 2nd of Torts § 339). Note that this case was decided prior to the enactment of the 14 M.R.S.A. § 159-A.

59. See id.

60. Docket No. CV-86-1213, Cumberland County Superior Court (decision and order, September 3, 1987).

61. Compare Preston v. Pierce County, 741 P.2d 71, 73, 48 Wash. App. 887 (1987) (Genuine issue of fact whether municipal landowner liable under Washington's recreational use statute where municipal employees knew of merry-go-round's dangerous condition as did injured child's mother, and planned to repair. Note that Washington's statute on its face imposes liability for dangerous conditions which injure minors.)

62. See supra note 60.

63. Id.

64. 27 A.2d 596, 598 (Me. 1942).

65. 14 M.R.S.A. § 159-A(1)(A).

66. New Jersey in particular has adhered to this distinction. See, e.g., Harrison v. Middlesex Water Co., 80 N.J. 391, 403 A.2d 910, 913-14 (1979) (recreational use statute not applicable in rural or suburban areas). Other states have adopted a similar rule. See e.g., Kucher v. Pierce County, 600 P.2d 683, 687-688 (1979) (immunity from liability inappropriate "where the land is improved and frequently policed).

67. 14 M.R.S.A. § 159-A(1)(b).

68. Id.

69. 760 F.2d 366 (1st Cir. 1985).

70. See 28 U.S.C.A. § 2671 et seq. Note that under the FTCA the federal government's liability is that if a similarly situated individual rather than a state governmental unit. 28 U.S.C.A. § 2674; Rayonier v. United States, 325 U.S. 315, 319 (1957). Thus, in instances where recreational users were injured on federal public land in Maine, e.g., White Mountain National Forest or the Appalachian Trail, 14 M.R.S.A. § 159-A applies.

71. Schneider, 760 F.2d at 368.

72. 14 M.R.S.A. § 159-A(1)(B).

73. Id.

74. Id.

75. Id.

76. See, e.g., Guillet v. City of New York, 500 N.Y. 2d 946 (1986) (jury found that student and teacher, walking through nature park to photograph, were "hiking" within meaning of New

York's recreational use statute); Fetterolf v. Ohio, 454 N.C.2d 564, 566 (sitting on beach watching others swim is a recreational use); Smith v. Scrap Disposal Corp., 158 Cal. Rptr. 134, 137 96 Cal. 3d 525 (genuine factual issues existed under California's recreational use statute where plaintiff, who had entered on defendant's land to fish, was injured on another parcel in defendant's possession); Gerkin v. Santa Clara Valley Water Dist., (1979) 157 Cal. Rptr. 612, 95 Cal. 3d 1022 (genuine issue of fact whether plaintiff, who was injured while walking bike across defendant's bridge, was "hiking" within meaning of statute); Johnson v. Sunshine Mining Co., Inc., 684 P.2d 268, 270, 106 Idaho 866 (1984) (motorcycling for pleasure a "recreational" use); Charpentier v. Geldern, 236 Cal. Rptr. 233, 239, 191 Cal. App. 3d 101 (1987) (diving into a river to "cool off" rather than "swim" clearly a recreational use).

77. See note 60 and accompanying text; infra notes 81 and 84.

78. L.D. 953, enacted by the 104th Legislature in 1969, P.L. ch. 196, was the precursor of L.D. 15889. L.D. 953 contained many of the basic provisions of L.D. 1588, which removed landowners' liability for recreational activities on water, for harvesting and gathering of forest products, and expanded the statutory list of recreational activities. Subsequent amendments follow the same pattern. A 1979 amendment, L.D. 870, P.L. ch. 519, added hang-gliding to the list of recreational activities. The Act was again amended in 1983 to specify that landowners were not liable for injuries suffered by all-terrain vehicle users. See L.D. 1549 §2, P.L. ch. 297 §2.

79. 14 M.R.S.A. § 159-A(6), L.D. 2229 § 23, P.L. ch. 762 § 25 of the 112th Legislature.

80. 14 M.R.S.A. § 159-A(4)(A).

81. See Jordan v. H.C. Haynes, Inc., 504 A.2d 618, 619 (Me. 1986) (the plaintiff's demonstration that defendant knew that the private way over a railroad crossing, altered by defendant's removal of the ties, was used by others raised no genuine issue of material fact that defendant had willfully or maliciously failed to keep his property safe or warn of a danger; therefore the trial court's entry of summary judgment, holding defendant not liable, was upheld).

82. See, e.g., Wright v. Dudley, 404 NW 2d 217, 219, 158 Mich. App. 154 (1987) (construction of a dock in shallow water and failure to warn those permitted to use dock for swimming not willful misconduct); Thomason v. Olive Branch Masonic Temple, 401 NW 2d 911, 913-14, 56 Mich. app. 736 (1987) (failure to cut grass and weeds where child killed while playing not willful or malicious); Cutway v. State, 456 N.Y.S. 2d 539, 541 (1982) (plaintiff, ATV rider, injured by a thin cable stretched across

dirt road cause of action based on defendant's willful misconduct where land was open to the public, the cable was difficult to see, and the State knew motorized vehicles used the road).

83. See 14 M.R.S.A. § 159-A(4)(B).

84. Kennebec Cty. Sup. Ct., No. CV-85-137 (decided August 7, 1986).

85. See also Moss v. Dep't of Nat. Resources, 62 Ohio St. 2d 138, 142 (1980) (no "consideration" under recreational use statute unless charge necessary to utilize overall benefits of recreation area; rent paid which enabled tenant to obtain beach pass for beach abutting apartment complex was "consideration"); Midwestern, Inc. v. No. Kentucky Community Center, 736 SW.2d 348, 351 (Ky 19) (recreational use statute applied on a day plaintiff did not have to pay for use of outdoor swimming pool even though a fee was usually charged).

86. A colloquy in the legislative record regarding the terms of L.D. 953, P.L. ch. 196, 104th Legislature, indicates that the Legislature may have intended such a result. See Maine Legislative Record, at 1093 (April 10, 1969), 1132 (April 11, 1969).

87. 14 M.R.S.A. § 156.

88. 14 M.R.S.A. § 159-A(4)(C).

89. 14 M.R.S.A. § 159-A(4)(B).

90. Cf. 14 M.R.S.A. § 159-A(4)(C). Under this provision, a landowner is not responsible for actions of a recreational users given permission to enter his land which harms another such user. Note however, the Condon would be liable only if he broached the duty of reasonable care owed one lawfully on his land. See Section II (B)(1), supra.

91. See supra note 47.

92. 14 M.R.S.A. § 159-A(6) (West Supp. 1986).

93. Note that since the fee shifting provision is only triggered when landowners are "found not to be liable," landowners may be forced to absorb expenses associated with suits that are initiated and dropped prior to a determination of liability.

94. See Maine Rules of Civil Procedure, Rule 11 (West 1986).

95. See 14 M.R.S.A. § 8116.

96. See id.

97. 14 M.R.S.A. § 8103(2)(F); see section III A(1)(b).

98. Noel v. Town of Ogunquit, Docket No. CV-84-351, York County Superior Court. Plaintiff Noel was injured while recreating on a public beach owned by the Town of Ogunquit. She was able to cover $300,000 (the extent of the town's insurance coverage) since the Town had purchased liability coverage for the beach area. The case is now on appeal.

99. Cf. Swallow v. City of Lewiston, 534 A.2d 975, 977 (Me. 1987).

100. See 14 M.R.S.A. § 159-A(6).

101. 14 M.R.S.A. § 8104-A(2)(A)(1), (3).

102. 14 M.R.S.A. § 8116.

103. 492 A.2d 241, 244 (Del. 1985).

104. See supra note 48 (the Maine statute did not contain, for example, the Model Act's preamble on which the court relied heavily in reaching its decision).

105. See id. at 248, 250. A related issue is whether a landowner would be liable for a partial, or ineffective warning; or for negligently executed precautionary steps. Although there is no definitive answer in Maine, the general "no-duty for negligence" principle of 14 M.R.S.A. § 159-A, enhancement of public access, and does not discourage good faith efforts to improve public safety.